90-193

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

TONY STEVEN STONE & PATSY ANN DUNN HOLLIDAY
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Has the United States Sentencing Commission unlawfully imposed a sentencing scheme for all controlled substances based upon "gross weight," which conflicts with the Congressional statutory scheme requiring the use of "gross weight" for only those controlled substances listed in Title 21, U.S.C., Section 841(b)(1)(A) and (b)(1)(B), and the use of "net weight" for those controlled substances listed in Title 21, U.S.C., Section 841(b)(1)(C) and (b)(2)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, TONY STEVEN STONE and PATSY ANN DUNN HOLLIDAY, respectfully pray that a writ of certiorari issue to review the unreported opinion of the United States Court of Appeals for the Fourth Circuit in the matter of *United States v. Tony Steven Stone & Patsy Ann Dunn Holliday* (No. 89-5571), which affirmed the judgments of conviction and sentence of the United States District Court for the Middle District of North Carolina at Greensboro.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit in this matter is set forth in the attached appendix (App. A). On April 27, 1990, the

United States Court of Appeals for the Fourth Circuit also denied petitioners' request for a rehearing, which was specifically based upon the issue presented in the instant petition. That petition for rehearing is set forth in the attached appendix (App. B). The District Court did not render a written opinion in this matter, but the issue of law presented herein was specifically addressed at the time of petitioners' sentencing hearings.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C. § 1254(1) on the ground that their rights under the due process clause of the Fifth Amendment of the United States Constitution were violated.

The instant petition for Writ of Certiorari is being filed within 90 days of an order denying a petition for rehearing of an opinion of the United States Court of Appeals for the Fourth Circuit, the latter of which affirmed the judgments and sentences of incarceration entered before the United States District Court for the Middle District of North Carolina at Greensboro, North Carolina.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States, states *inter alia:*

> "No person shall . . . be deprived of life, liberty or property without due process of law . . . "

Title 21, U.S.C. § 841 was invoked in part by petitioners before both the trial court and the Court of Appeals in this matter as a basis for invalidating the sentencing guideline established for the crimes for which petitioners

pleaded guilty. As the relevant portions of this statute are lengthy, petitioners have set them out in the attached appendix. In Appendix C are the provisions applicable for the contraband in petitioners' case. Petitioners contend that the United States Sentencing Commission, the trial court, and the Appellate Court improperly relied upon the provisions of Title 21, U.S.C. § 841 which are set out in Appendix D.

I.

STATEMENT OF THE CASE

On September 26, 1988, petitioners were named with three others in a 7-count indictment relating to the unlawful distribution of Dilaudid (hydromorphone hydrochloride), a schedule II narcotic controlled substance, and Diazepam (generic Valium), a schedule IV non-narcotic controlled substance. Both petitioners pleaded guilty to Count I of the indictment, which charged conspiracy to possess these controlled substances with intent to distribute, pursuant to Title 21, U.S.C. §§ 841(a)(1) and 846. Both petitioners were sentenced before the Honorable Frank W. Bullock, Jr., United States District Judge for the Middle District of North Carolina. Petitioner STONE was sentenced on March 2, 1989 to a term of imprisonment of 27 months. Petitioner HOLLIDAY was sentenced on March 15, 1989, and was committed for a term of imprisonment of 33 months.

Prior to their sentencing, petitioners filed legal memoranda which, among other things, challenged the lawfulness of the sentencing guidelines applicable to their case on the grounds that the offense level was erroneously calculated based upon the gross weight, as opposed to the net weight, of the pharmaceutical drugs at issue.

On appeal of their sentences and judgments to the United States Court of Appeal for the Fourth Circuit, petitioners claimed in part this same infirmity of the sentencing guidelines. Following the circuit court's affirmance (See Appendix A, pgs. 1-5), petitioners requested a rehearing before the Court of Appeals, claiming that the court had overlooked a material point of law in its reading of the sentencing statute at issue. (Appendix B) On April 27, 1990, the Fourth Circuit Court of Appeals denied petitioners' request for a rehearing, and the instant petition is now sought to review that judgment.

II.

STATEMENT OF FACTS

The charges against petitioners arose out of the seizure pursuant to a warrant of two boxes which had been delivered by the United States Postal Service. Within these boxes were found 231 tablets of Dilaudid, and 20,000 tablets of Diazepam. The 231 tablets of Dilaudid consisted of 182 tablets of 2 mg. strength and 49 tablets of 4 mg. strength. Each 2 mg. tablet of Dilaudid weighed 88 mgs., while each 4 mg. tablet of Dilaudid weighed 90 mgs. Thus, the gross weight of the Dilaudid tablets, including both the inert as well as active ingredient, was roughly 36 times the weight of the actual controlled substance involved.

Similarly, of the Diazepam seized in this case, there were 7,000 tablets of 10 mg. strength and 13,000 tablets of 5 mg. strength. Each Diazepam tablet, regardless of its potency, weighed 170 mgs. Thus, the gross weight of the tablets was 25 times that of the actual weight of the Diazepam charged against petitioners.

Petitioners' sentences were based upon the total gross weight of 3,420.426 grams of Dilaudid and Diazepam, for a heroin equivalency under the guidelines of 51.49 grams. (See Federal Sentencing Guidelines Manual, pgs. 73-76) This equates under the sentencing guidelines to an offense level of 20. (Federal Sentencing Guidelines Manual, pg. 69) Petitioners' calculation of the offense level based solely upon the net weight of the controlled substances involved resulted in the conclusion that their offense level should be no greater than level 12, which provides for a 10 to 16 month range of imprisonment, as opposed to a 33 to 41 month range of imprisonment. Petitioners' calculation of their offense level would also make them available for a "split sentence", which was not available under the calculations actually used at their sentencing. (See Federal Sentencing Guidelines Manual, §§ 5C1.1(c)(3)(d)(2)).

III.

REASONS FOR GRANTING WRIT

Petitioners' maintain that they were unlawfully incarcerated, because the United States Sentencing Commission Guidelines, which were used to calculate each of their terms of incarceration, conflict with the plain language of the Congressional sentencing scheme for the offense to which they pleaded guilty. Specifically, petitioners find fault with the United States Sentencing Commission's method of calculating offense levels based upon the gross weight of Dilaudid and Diazepam in this case, as opposed to the net weight of those controlled substances.

The United States Sentencing Commission's methodology, and the basis for that methodology, have not been precisely set out. In a footnote to the drug quantity table, the Sentencing Commission stated that "the scale amounts for all controlled substances refer to the total

weight of the controlled substance." The Commission went on to state that consistent with the provisions of the "Anti-Drug Abuse Act," "if any mixture or compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." Federal Sentencing Guidelines Manual, 1987 Edition, fn. pg. 59. In the 1990 edition of the Federal Sentencing Guidelines Manual, the Commission deleted any reference to "scale amounts for all controlled substances", and instead stated that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Federal Sentencing Guidelines Manual, 1990 Edition, fn. pg. 71. In Commentary No. 10, which follows the drug quantity table set forth in § 2D1.1(c) of the Guidelines, the Commission states that the statutory basis for the sentences it provided for drug offenses is derived from Title 21, U.S.C. § 841(b)(1). Federal Sentencing Guidelines Manual, 1990 Edition, pg. 73.

This statutory derivation is relied upon despite the Commission's recognition that that statute provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, Fentanyl, LSD, and marijuana. Moreover, what is not recognized by the Sentencing Commission in relying upon the language "a mixture or substance containing a detectable amount", is that Congress did not utilize that language for all controlled substances. Congress provided a sentencing scheme based upon that language only for certain substances, namely those just previously mentioned. Others, such as the Diazepam and Dilaudid involved in petitioners' case, were not penalized based upon "a mixture or substance containing a detectable amount" of controlled

substance. This dichotomy is set out in the attached appendices, C and D.

The United States Sentencing Commission, although placed by Congress in the judicial branch, is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body vested by Congress with a legislative responsibility for establishing minimum and maximum penalties for every crime. *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 101 L.Ed.2d 714 (1989). Nonetheless, because the sentencing guidelines promulgated by the United States Sentencing Commission have not been passed by Congress pursuant to bicameralism and presentation, *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), the guidelines are not legislation.

The United States Sentencing Commission was instructed to promulgate guidelines consistent with Title 28, U.S.C. § 994 and Title 18, U.S.C. § 3553. Therefore, to the extent that the Sentencing Guidelines are inconsistent with the United States Sentencing Commission's enabling act, the guidelines are invalid, and therefore, not binding on the sentencing court. *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 111-112, 117, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978). A regulation which operates to create a rule out of harmony with Congressional enactment is a mere nullity. *Manhattan General Equipment Company v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed.2d 528 (1936). *See*, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976); *Dixon v. United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965).

When Congress has spoken directly to a question and its intent is clear, an agency like the United States Sentencing Commission must give effect to that intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *Board of Government of the Federal Reserve System v. Dimension Financial Corp.,* 474 U.S. 361, 368, 106 S.Ct. 681, 685-686, 88 L.Ed.2d 691 (1986).

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense, supra,* 467 U.S. 837, at 843, fn. 9. The agency's own interpretation of the statute does not control in circumstances of clear Congressional intent. *SEC v. Sloan, supra,* 436 U.S. at 117-118. The intent of Congress is determined by looking at the language of the statute, the scheme of the statute and the legislative history. *United States v. Larinoff, supra,* 431 U.S. at 873.

The Congressional language "a mixture or substance containing a detectable amount", upon which the United States Sentencing Commission bases its methodology of offense level computation for all controlled substances first appeared in the Controlled Substances Penalties Amendments Act of 1983. Pub.L. 98-473 Title V, §§ 224(a) 502, 503(b)(1), (2) October 12, 1984, 98 Stat. 2030, 2068, 2070. Prior to the enactment of that law, the severity of the penalties described in Title 21, U.S.C. § 841 depended, with but one exception, solely on the scheduling of the controlled substance involved, and in the case of a controlled substance in Schedule I or II, on whether the controlled substance was a "narcotic drug." At that time the only instance in which the amount of

controlled substance influenced the severity of the penalty was in the case of marijuana.

The primary features of Title 21, U.S.C. § 841 which were changed by the Controlled Substances Penalties Amendments Act of 1983 was to designate "particularly dangerous drugs" and to prescribe higher penalties, by use of minimum mandatory terms of incarceration, than those previously proscribed. S.Rep.No.98-225, August 4, 1983, pg. 258; U.S. Code Congressional & Administrative News, 1984, pg. 3440. Thus, as mentioned previously, specifically enumerated controlled substances were singled out by Congress for special treatment at time of sentencing. In the process, Congress determined that sentences for violations of Title 21, U.S.C. § 841(a) for those specifically enumerated substances should be treated without regard to purity, using the language, "a mixture or substance containing a detectable amount of" the enumerated drug or narcotic. Since the time of this amendment, Congress has revisited and amended these provisions of law, has not applied that particular language to any other controlled substances, like Dilaudid and Diazepam, and it has decided not to provide minimum mandatory penalties based upon the quantity of other controlled substance. *See,* Pub.L. 99-570, Title I, § 1005(a), October 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1103, Title XV, § 15005, October 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title 6, §§ 6055, 6254(h), 6452(a), 6470(g)(h), 6479, November 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4382.

Several circuits have been presented with challenges identical to the one presented in the instant petition, but those have primarily dealt with controlled substances for which Congress has applied the language, "a mixture or

substance containing a detectable amount". *See, United States v. Daley,* 883 F.2d 313 (4th Cir. 1989), *cert. den.,* ____ U.S. ____, 110 S.Ct. 2622 (1990) (LSD); *United States v. Skelton,* 901 F.2d 1204 (4th Cir. 1990) (PCPy); *United States v. Taylor,* 868 F.2d 125 (5th Cir. 1989) (LSD); *United States v. Baker,* 883 F.2d 13 (5th Cir.) *cert. den.,* ____ U.S. ____, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989) (methamphetamine); *United States v. Mueller,* 902 F.2d 336, 345 (5th Cir. 1990) (methamphetamine); *United States v. Elrod,* 898 F.2d 60 (6th Cir. 1990), petition for cert filed, May 31, 1990, No. 89-7689 (LSD); *United States v. Rose,* 881 F.2d 386 (7th Cir. 1989) (LSD); *United States v. McGeehan,* 824 F.2d 667 (8th Cir. 1987), *cert. den.,* 484 U.S. 1061, 108 S.Ct. 1017, 98 L.Ed.2d 92 (1988) (LSD); *United States v. Bishop,* 704 F.Supp. 910 (N.D.Iowa 1989), *aff'd,* 894 F.2d 981 (8th Cir. 1990), petition for cert filed June 6, 1990, No. 89-7708 (LSD); *United States v. Marshall,* 706 F.Supp. 650 (C.D. Ill. 1989) (LSD).

Not surprisingly, none of the above cases discussed the sentencing dichotomy which exists in Title 21 U.S.C. § 841(b) surrounding the use of the language "a mixture or substance containing a detectable amount", because that language applies directly to the controlled substances involved in those cases.

Counsel has discovered three appellate court decisions dealing with controlled substances for which Congress has not employed that language. In *United States v. Gurgiolo,* 894 F.2d 56 (3d Cir. 1990), *rehearing denied* February 13, 1990, the Appellate Court overturned a District Court ruling that the offense level under the drug quantity table for Schedule II drugs should be based upon net weight. The Appellate Court recognized that a sentencing dichotomy exists with respect to the use of the

language "a mixture or substance containing a detectable amount", but misquoted Title 21, U.S.C. § 841(b)(1)(C) (see Appendix C herein) by omitting the word "except" as it applied to the Schedule II drugs that Congress had determined should be treated without regard to the net weight of that controlled substance. Thus, the *Gurgiolo* court improperly rewrote the statute in contravention of Congressional intent, reasoning that if Congress had treated cocaine (a Schedule II drug) without regard to net weight, there was no reason that other Schedule II drugs should not be treated similarly, despite an explicit statutory scheme to the contrary. In *United States v. Meitinger*, 901 F.2d 27 (4th Cir. 1990), the identical issue raised in this petition was treated summarily by the court with citation to *United States v. Daley, supra.* The *Daley* case of course dealt with LSD, for which Congress applied the language, "a mixture or substance containing a detectable amount", and the *Meitinger* opinion does not mention the sentencing dichotomy argued herein. In *United States v. Bayerle,* 898 F.2d 28 (4th Cir.), petition for certiorari filed, June 7, 1990, No. 89-1934, the Fourth Circuit also dealt with this issue, but again there was no mention in that opinion of the Congressional distinction first established by Congress in the Controlled Substances Penalties Amendments Act of 1983.

Undoubtedly, Congress can base sentencing on the quantity of a drug without regard to purity, because it is reasonably related to the proper legislative purpose of penalizing large volume drug traffickers more harshly. *See United States v. Whitehead,* 849 F.2d 849, 859-60 (4th Cir.) *cert. den.* ____ U.S. ____, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *United States v. Klein,* 860 F.2d 1489, 1501 (9th Cir. 1988); *United States v. Holmes,* 838 F.2d 1175, 1177 (11th Cir.) *cert. den.,* 486 U.S. 1058, 108 S.Ct. 2829, 100 L.Ed.2d 930 (1988). This was exactly the object of the

Congressional amendments to Title 21, U.S.C. § 841(b) when Congress utilized the language "a mixture or substance containing a detectable amount". *United States v. McGeehan, supra; United States v. Bishop, supra.* However, the United States Sentencing Commission is obviously incorrect in its interpretation that Congress intended sentencing without regard to purity or the amount of carrier mediums for all controlled substances. By making such an interpretation, the United States Sentencing Commission has not only put itself in direct conflict with the clear language of Title 21, U.S.C. § 841(b), it has violated its express mandate that sentences be imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to provide certainty and fairness in meeting the purposes of sentencing, and to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. Title 28, U.S.C. § 991(b); Title 18, U.S.C. § 3553(a).

CONCLUSION

Counsel for petitioners perceive that in terms of the number of cases, the impact of a reversal by this court of petitioners' sentences will not be great. Federal law enforcement resources are directed in large part towards just those controlled substances, such as cocaine, which were singled out by Congress in the 1984 amendments to Title 21, U.S.C. § 841(b). However, the impact is serious for those relatively few individuals who stand convicted of drug offenses for which Congress clearly intended to be treated differently at the time of sentencing. The United States Sentencing Commission's methodology has dramatically, and unlawfully, skewed upward the length of imprisonment for such individuals. For all the foregoing,

then, it is respectfully submitted that the instant petition should be granted.

DATED: July 25, 1990

Respectfully submitted,

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Attorney for Petitioner
PATSY ANN DUNN HOLLIDAY

JAMES B. CRAVEN, III
Attorney for Petitioner
TONY STEVEN STONE

APPENDIX A

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-5562

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

TONY STEVEN STONE,
Defendant-Appellant.

No. 89-5571

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PATSY ANN DUNN HOLLIDAY,
Defendant-Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., District Judge. (CR-88-125-D) FILE

Argued: December 8, 1989 Decided: March 29, 1990

Before RUSSELL and MURNAGHAN, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: James B. Craven, III, Durham, North Carolina; David Avrum Elden, Los Angeles, California, for Appellants. Benjamin H. White, Jr., Assistant United

States Attorney, Greensboro, North Carolina, for Appellee. ON BRIEF: Robert H. Edmunds, Jr., United States Attorney, Douglas Cannon, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

The appellants, Tony Steven Stone and Patsy Ann Holliday, were charged in Count One of the indictment against them with conspiracy to distribute large quantities of Dilaudid (a morphine-like prescription drug) and Diazepam (generic Valium), in violation of 21 U.S.C. Sections 841(b)(1)(c), 843(b)(2), and 846. Upon a plea of guilty, Stone was sentenced to 27 months' imprisonment and Holliday to 33 months' imprisonment. Each appellant now appeal, as excessive and unconstitutional, the length of the sentence imposed. We affirm.

I.

Patsy Holliday, a pharmacist at a Veteran's Administration hospital in Los Angeles, stole quantities of Dilaudid (a highly addictive painkiller) and Diazepam from her employer and shipped them via the United States mails to Tony Stone for sale and distribution in North Carolina. This enterprise continued between November of 1985 and January of 1988 when federal officials seized two parcels containing 20,000 tablets of Diazepam and 23 tablets of Dilaudid.

During the sentencing phase of this proceeding, argument ensued about both the dosage of the factory packaged pharmaceutical drugs and the applicability of the drug quantity table in Section 2D1.1 of the Federal

Sentencing Guidelines, 18 U.S.C.A. App., a footnote to which explains:

> Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity.

The appellants contend that it was error for the district court to determine the appropriate offense level based on the gross weight of the drugs seized but rather should only consider the actual weight of the Diazepam and Dilaudid contained in each tablet. This argument was rejected by the district court, and the sentence was calculated pursuant to Section 2D1.1 of the Guidelines based on the gross weight of the seized narcotics, even though the weight of the inert distribution medium was heavier than the narcotic itself.

In *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989), the question of whether under Section 2D1.1 a sentence should be calculated on the basis of the weight of the drug itself and the carrier medium was considered. The *Daly* court held that under the plain language of the Anti-Drug Abuse Act, specifically 21 U.S.C. Section 841, and the Sentencing Guidelines, the combined gross weight of the narcotic (in that case lysergic acid diethylamide (LSD)) and any carrier mediums may be used for the purpose of determining base offense levels under Section 2D1.1. Other courts have agreed. In *United States v. Taylor*, 868 F.2d 125, 127-128 (5th Cir. 1989), the Fifth Circuit held that sentencing according to the total weight of the substance containing a detectable amount of narcotic was proper, even though the weight of the distribution medium was generally heavier than the weight of the drug

itself. We now decline to depart from such a ruling and affirm the sentence imposed by the district court.

II.

There are three further contentions set forth by the appellants that we now address briefly. The first is that the Sentencing Guidelines violate the due process clause of the Fifth Amendment. This court has rejected the very constitutional challenge here made. *See, United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989).

Next, the appellants contend that because of the relatively low purity of the narcotics seized, a downward departure from the Guidelines was mandated in this case. Congress has long classified controlled substances without reference to purity. *See* 21 U.S.C. Section 812. The Guidelines, as promulgated in compliance with this long-standing practice, contemplate no downward departure on the basis of low drug purity. Now to read into the statute and allow for such an adjustment would result in an impermissible departure from the sentencing philosophy embodied in Section 2D1.1 — to avoid unwarranted sentencing disparities among those guilty of similar crimes. *See United States v. Daly, supra*; *United States v. Baker*, 883 F.2d 13, 15 (5th Cir. 1989).

Finally, appellant Stone contends that his sentence violated the terms of his plea agreement. In that agreement, both parties stipulated that any active federal time imposed would run concurrently with the three-year state sentence that the appellant was serving at the time of the agreement. However, before the imposition of his federal sentence, appellant was paroled due to prison over-crowding having served only 173 days in the state penitentiary. Accordingly, when sentencing the appellant, the district court reduced the federal sentence by six months (the

equivalent 173 days). We find that such a departure comported with the provisions of the plea agreement.

III.

For the reasons set forth herein, the judgments of conviction of the appellants are hereby

AFFIRMED.

APPENDIX B

Appendix B-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record Nos. 89-5562(L)
and 89-5571

UNITED STATES OF AMERICA,

Appellee,

vs.

TONY STEVEN STONE and
Patsy Ann Holliday,

Appellants.

PETITION FOR REHEARING

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STATEMENT OF COUNSEL

The undersigned counsel of record for Appellants hereby request on their behalf a rehearing in this matter, and it is the judgment of the undersigned that the Court's opinion in this matter overlooks a material point of law with respect to its ruling that the Appellants' sentence under the Federal Sentencing Guidelines was properly calculated based upon the gross weight of the controlled substances in their possession.

ARGUMENT

CONGRESS INTENDED THAT SENTENCING FOR ILLEGAL POSSESSION OF SOME CONTROLLED SUBSTANCE IS TO BE BASED UPON GROSS WEIGHT, AND OTHERS TO BE BASED UPON NET WEIGHT.

In Appellants' opening brief (at pages 3-10), it is argued that there is a distinct legislative dichotomy established by the Anti-Drug Abuse Act of 1984 and codified in 21 U.S.C. 841. The Court's opinion in this case correctly points out that the Sentencing Commission has referred to Section 841 as a basis for the guideline scheme of using gross weight as a basis for sentence for all controlled substances. However, the Sentencing Commission's reading of Section 841 is clearly incorrect. The two subdivisions applicable to the controlled substances which the Appellant possessed, unlike cocaine, PCP, LSD, and certain amounts of marijuana and methamphetamine, do not direct sentences based upon "a mixture or substance containing a detectable amount" of the controlled substance. Compare 21 U.S.C. 841(b)(1)(A) and (B) with 21 U.S.C. 841(b)(1)(C) and (b)(2). In other words, when Congress amended the sentencing scheme for controlled substances in 1984, for

controlled substances such as those involved in the instant matter, there is a clear intent to retain the traditional sentencing scheme based upon net weight.

The two cases cited by the Court are correct in their rulings insofar as the controlled substance involved in those two cases (LSD) is categorized under Section 841 among those controlled substances for which sentencing is based upon gross weight, *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989) and *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989). Appellant specifically takes issue with the holding from the former case indicating that the "plain language" of the Anti-Drug Abuse Act was correctly adopted by the Sentencing Commission in its formulation that all drug quantity determinations under the guidelines must be based upon gross, as opposed to net, weight. Appellants respectfully contend that the opinion in *Daly*, and the opinion in this case, incorrectly overlook the actual language used by Congress, and there is no recognition by this Court of the sentencing dichotomy established under 21 U.S.C. 841. See e.g. *United States v. Daly, supra*, 883 F.2d at 317.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that rehearing of this matter is appropriate.

This 12th day of April, 1990.

Respectfully submitted,

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APPENDIX C

Appendix C-1

Title 21 U.S.C. Section 841(b)(1)(C) provides in pertinent part:

> In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000.00 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

Title 21 U.S.C. Section 841(b)(2) provides in pertinent part:

> In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.

APPENDIX D

Appendix D-1

Title 21 U.S.C. Section 841(b)(1)(A) provides in pertinent part:

Except as otherwise provided in Section 845, 845a or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving —

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of —

(I) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) Any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethy)-4-piperidyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

Title 21 U.S.C. § 841(b)(1)(B) states in relevant part:

(B) In the case of a violation of subsection (a) of this section involving —

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of —

(I) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) Any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subsection (I) though (III)

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salt, isomers, and salts of its isomers, or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life; a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.